Consultation on Extending the Availability of Protective Expenses Orders

Preliminary Comments

Before answering the specific questions, I wish to make the following points.

In general, I welcome the proposals set out in the consultation document and the draft rules as they will improve access to justice, improve compliance with the Aarhus Convention and may have a positive effect on the environment. However, I have several concerns.

Absence of a comprehensive review of protective expenses orders (PEOs)

The main purpose of the consultation is to seek feedback on extending the availability of Environmental PEOs beyond the Court of Session to the sheriff courts; and the Sheriff Appeal Court. As such, the consultation relates only to environmental PEOs and does not propose any alteration to common law PEOs. I have previously argued that operating two different regimes for cost protection for public interest litigants is, in principle, unsatisfactory.[1] This is because the justifications for having PEOs in environmental cases are no different from those applying to public interest litigation generally. The principal justification is, as discussed below, that of maintaining the rule of law by ensuring that public spirited citizens and pressure groups are not deterred from pursuing cases which are in the public interest. This justification applies to all public interest litigation and not uniquely to environmental litigation. Whilst there were particular reasons for introducing a separate regime for PEOs in 2013, they do not amount to justification. I remain of that view.

I recommend, therefore, that once the current consultation has closed and rules have been made extending the availability of Environmental PEOs to the sheriff courts and the Sheriff Appeal Court (on the assumption that new rules will in fact be made) that either the SCJC or the Scottish Government undertakes a comprehensive review of PEOs. That review should not be restricted to environmental cases but should cover all public interest litigation whatever the subject matter. It should consider PEOs in the round in the light both of the UK's international law obligations and the common law principles of access to justice which are discussed below. The review should include consideration of whether and to what extent there should continue to be differences between common law and environmental PEOs in the light both of rational policy considerations and the common law principles of access to justice and the rule of law.

Improving Aarhus compliance

The policy objectives of the proposals are:

- To improve access to justice
- To provide comparable rules across different courts
- To improve Aarhus compliance.

It is disappointing to see that the third policy objectives of the proposal is merely to improve Aarhus compliance and not to achieve full compliance with the Aarhus Convention. environmental PEOs were first introduced in 2013 under RCS Chapter 58A. Amendments were made in 2015, 2018 and 2024 yet the PEO regime is not fully Aarhus-compliant. There seems to be no good reason why, 12 years after environmental PEOs were first introduced,

[1] Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation', 19 EDINBURGH L. REV. 36 (2015).

that the rules governing them should not be fully Aarhus-compliant. Nor is any reason given in the consultation paper why full compliance is not being proposed.

Therefore, I recommend, therefore, that the rules be revised so as to address all of the concerns raised by the governing body of the Aarhus Convention (*Decision VII/8s concerning United Kingdom*).

Access to justice and the rule of law

The first and third aims of the proposals raise legal questions as well as policy questions. Clearly, the Aarhus Convention imposes international law obligations on the UK to ensure that the public has the right to challenge environmental decisions in court if they do not comply with relevant legal requirements. However, it is important to note that there are also domestic law principles which are relevant to the discussion. These concern public interest litigation, access to justice and the rule of law.

The three are closely connected. In *AXA General Insurance v HM Advocate* [2011] UKSC 46, the UK Supreme Court, expanded the rules of standing in Scots law to permit persons to seek judicial review in the public interest. This expansion of standing was grounded firmly in the rule of law. The court said that, in order to preserve respect for the rule of law, it is appropriate to allow persons to litigate to protect widely shared interests. In particular, Lord Reed said:

> "The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. . . . There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: . . . A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing." (para. 169)

Subsequently, *Walton v The Scottish Ministers* [2012] UKSC 44 confirmed the place of public interest standing in Scots Law and Lord Reed again referred to the courts constitutional function of maintaining the rule of law as justifying a broad approach to standing (para 90.) These cases, therefore, emphasised expressly the connection between standing to sue and the rule of law. They also emphasised implicitly the connection between access to justice and the rule of law as the broadening of standing increased access to justice.

Then, in *R (Unison) v Lord Chancellor* [2017] , the UK Supreme Court considered a challenge to the legality of increased fees for bringing claims before employment tribunals. In upholding the challenge, the court stressed both that that the constitutional right of access to the courts is inherent in the rule of law and that enforcement of the law is in the public interest. Lord Reed said:

> "66. The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent

> times is apparent from the consultation papers and reports discussed earlier. It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since "ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services".
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> 67. It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.
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> 68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by *897 Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.
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> 69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance.
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> ….
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> 102. There is a further matter, which was not relied on as a separate ground of challenge, but should not be overlooked. That is the failure, in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972. Fundamentally, it was because of that failure that the system of fees introduced in 2013 was, from the outset, destined to infringe constitutional rights."

Taken together, these cases and dicta make clear that access to justice is an important principle of domestic law as well as of international law and has concrete legal effects. They also make clear that there is a nexus between public interest litigation access to justice and the rule of law. If those who might bring public interest litigation face unjustified obstacles to doing so this undermines access to justice and the rule of law.

There is good reason to see Lord Reed's remarks in UNISON (when taken together with his remarks in *AXA* quoted) above as *generally applicable* and as laying down the approach that public authorities should follow when making policy decisions on access to justice. Specifically, they should consider the value of access to justice not merely as a moral or political value (which it certainly is) but also as a legal value which must be respected. Thus, although it is clearly essential to consider the requirements of the Aarhus Convention when reforming PEOs in environmental cases, it is also necessary to consider the common law principles as well.

Having explained why the current proposals do not address all of my concerns regarding PEOs, and are not fully compliant with the Aarhus convention, I will now respond to the specific questions in the consultation on the assumption that some improvements to access to justice and to Aarhus compliance are better than none.

Question 1 **– Do you agree that the ability to seek a PEO should now be extended to the sheriff court for the summary applications that can arise under the Environmental Protection Act 1990? If not why not?**

Yes, the ability to seek a PEO should now be extended to the sheriff court for the summary applications that can arise under the Environmental Protection Act 1990. This will advance the three policy objectives stated in the consultation paper (to improve access to justice by extending the availability of costs protection; to provide comparable rules for the sheriff courts and the Sheriff Appeal Court to the existing PEO Rules for the Court of Session; to improve compliance with the Aarhus Convention).

Moreover, extending PEO procedure to the sheriff court and Sheriff Appeal Court is likely to have a significant effect" on the environment by providing opportunities both to avoid or reduce adverse environmental effects and to enhance positive environmental effects by increasing the number of environmental cases in the courts

I do not think there are any substantial adverse effects likely if these changes are made.

Question 2 **– Do you have any concerns or suggested changes to the wording of the proposed cost protection rules as set out in the new Part LV of the Summary Application Rules?**

There are several respects in which the proposals will not result in compliance with the Aarhus Convention. These are discussed in relation to the specific questions below.

Question 3 **– Other than summary applications; are there other types of actions raised within the sheriff court where you think lodging a motion for an *Environmental PEO* should be an option? If so please provide examples?**

Yes, the proposed rules changes will not enable parties to obtain a PEO in common law proceedings for nuisance. Such actions may fall within the scope of Article 9 of the Aarhus Convention where they are brought in the public interest to protect the environment. That the person raising the action is invoking a private law right does not prevent their also being a public interest litigant. That will depend upon their purposes in pursuing that action. This is one of the reasons why the current PEO rules are non-compliant. Other types of action which fall within the scope of the Convention may also be excluded. Reform of PEOs should in principle result in their covering all litigation which is within the scope of the Convention.

There are two ways in which this might be achieved. One would be to try to identify all types of action which fall within the scope of the Convention and then to list them specifically in the rules, as is done by proposed Rule 28A.1. for the sheriff court which lists a number of proceedings under Environmental Protection Act 1990.

The alternative would be to employ a general form of words such as that used in Rule 58A.1 for the Court of Session: "relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment"(without the restriction of relevant proceedings to applications to the supervisory jurisdiction and to

appeals under statute which currently appear in Rule 58A.1). Those words are wide enough to encompass all types of action which might be brought to protect the environment whether based on statute of common law.

The main advantage of the former compared to the latter is that will provide immediate clarity as to the types of proceedings in which a PEO is competent. With the general formula, there may be some uncertainty as to whether particular types of action are covered until case law emerges. Conversely, the possible disadvantage of the former compared to the latter is that certain relevant types of action are omitted because their potential to be used for purposes of environmental protection are not anticipated.

In the light of these considerations, **I recommend** that, in order to achieve compliance with the Aarhus Convention, the ability to apply for a PEO is extended to common law nuisance litigation and to any other types of action in the sheriff court which are within the scope of the Convention.

I also recommend that the SCJC seeks to identify all types of action which might reasonably thought to have the potential to be used for environmental and to conduct or commission research for that purpose if necessary.

***Question 4* – Do you agree that the ability to seek a PEO afresh, or to have one carried forward, should be extended to the Sheriff Appeal Court? If not why not?**

Yes.

***Question 5* – Do you have any concerns or suggested changes to the wording of the proposed rules as set out in the new SAC Chapter 28A?**

I have concerns related to the requirement to disclose the terms of representation, the requirement to estimate liability for adverse expenses and the caps on expenses.

<u>Terms of representation</u>

I recommend that draft rule 28A.3.(3)(a)(ii) (the requirement to disclose the terms of representation) should be deleted.

This is an obligation beyond what is normally imposed on the parties in civil litigation Some litigants may have good reason not to disclose the terms of representation and the requirement might discourage them for litigation. The benefits of having such a rule do not seem to outweigh the possible disadvantage of a deterrent effect. As it creates a potential obstacle to litigation without a compelling justification, I do not think this proposal is Aarhus-compliant.

<u>Requirement to estimate liability for adverse expenses</u>

I recommend that draft rule 28A.3.(3)(a)(iv) (the requirement to estimate liability for adverse expenses) should also be deleted.

This rule requires the applicant to engage in a somewhat speculative exercise on the basis of incomplete information. As well as being a difficult exercise, it creates a significant amount of additional work for the applicant which may delay litigation and will be reflected in increased legal fees. As it creates a potential obstacle to litigation without a compelling justification, I do not think this proposal is Aarhus-compliant.

Caps on expenses

The proposed rules limit the applicant's liability in expenses to the respondent to the sum of £5,000, or such other sum as may be justified on cause shown; and limit the respondent's liability in expenses to the applicant to the sum of £30,000, or such other sum as may be justified on cause shown. This is based on the terms of current Rule 58A.7.

I recommend that draft rule be amended to provide that the £5,000 limit is a maximum and can be varied only by decreasing it. the current rule undermines certainty for applicants in the estimation of their expenses as they cannot be sure that their liability will exceed £5000. The discretion to increase the cap tends to undermine the purpose of PEOs which is to provide predictability of the cost of litigation.

I recommend also that draft rule 28A.5(1)(b) should be deleted so that PEOs do not impose a limit on the ability of a PEO applicant to recover their expenses from their opponent. The £30,000 cross-cap potentially prevents public interest litigants from recovering their full litigation costs and this may well be a deterrent to litigation. It also puts the defender in an action in a better position than he would be in when defending other types of litigation. Clearly, if the applicant's liability to the respondent is limited to £5,000 and the respondent's liability to the applicant is not capped, there is a substantial asymmetry between the two sides of the litigation. Whilst some will consider this unfair, it is worth noting that creating a substantial asymmetry is inherent to the concept of the PEOs and its rationale is to address other inequalities in litigation.

Section 6 - Amending PEOs in the Court of Session:

***Question 6* – do you agree that the current ability to seek a PEO within the Court of Session should also be available to a multiparty action initiated under Group Procedure? If not why not?**

Yes, the current ability to seek a PEO within the Court of Session should also be available within a multiparty action initiated under Group Procedure?

Section 7 – The potential future rule changes:

***Question 7* – do you have a view on whether rule 58A.7 should continue to support the court increasing the caps upwards by exception, or whether that reference to "on cause shown" should be deleted so that this rule reverts to using "fixed maximum sums"?**

The change made in 2018 increased uncertainty for applicants and the current form of the rule does not appear to be Aarhus-compliant. The references to "on cause shown" should be deleted from the rule so that there are a fixed maximum sums.

***Question 8* - do you have a view on whether rule 58A.5 should continue to require applicants to provide information on the terms on which they are legally represented, or whether section (3) (a) (ii) should be withdrawn?**

Rule 58A.5 should **not** continue to require applicants to provide information on the terms on which they are legally represented for the reasons given in answer to question 5 above.

Question 9 **- do you have a view on whether rule 58A.5 should continue to require applicants to provide an estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?**

Rule 58A.5 should **not** continue to require applicants to provide an estimate of the likely expenses that could be awarded against them for the reasons given in answer to question 5 above.

Question 10 **– Do you have any other suggested improvements regarding the PEO Rules, over and above those already raised directly with the Council or indirectly via the compliance committee?**

I recommend that the PEO rules should be amended to ensure that PEOs carry over to applications for permission to appeal to the UKSC by default.

Also, as noted in my preliminary comments, **I recommend**, (i) that the rules be revised so as to address all of the concerns raised by the governing body of the Aarhus Convention; (ii) that consideration is given to whether the current PEO rules are compatible with the common law principles of access to justice and the rule of law; and (iii) that the Scottish Government and the SCJC undertake a comprehensive review of PEOs (not restricted to environmental cases) which considers them in the round in the light both of the UK's international law obligations and the common law principles of access to justice.

Section 8 - Confirming the 3 amendments made in 2024:

Question 11 **– do you agree with the rule change made that makes provision for confidentiality to be sought within a motion for a PEO?**

Yes

Question 12 **– do you agree with the rule change made that supports carrying a PEO over on appeal in the same manner regardless of who is appealing?**

Yes

Question 13 **– do you agree that it is useful for rule 58A.10 to replicate the information from case precedent regarding intervener's expenses?**

Yes